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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-977

HULAN E. JACK,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 9, 1973

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To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court

The petitioner, Hulan E. Jack, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 12, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 12, 1972 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

No extension of time within which to file the instant petition has been sought.

Question Presented

1. Whether the term "willfully violates" in 29 U.S.C. §186 requires the government, in a prosecution under that statute, to prove that defendant was aware of the restrictions of the statute or acted in reckless disregard of it.

Statutory Provision Involved

United States Code, Title 29, Section 186.

Statement of Case

This case concerns the operations from 1966 to 1970 of Coordinated Community Services, Inc. ("CCS"), a private stock corporation, whose shares were owned by four persons. There was no dispute as to stock ownership by three persons: Hulan E. Jack, Theodore Solomon and Harry Rosenblum. As to the owner of the remaining shares, the government argued that it was L. Joseph Overton; the defense contended that it was his brother, Lawrence J. Overton.

During the period in question, L. Joseph Overton was the business agent in the Harlem area for Local 338, Retail, Wholesale Chain Store Food Employees Union, AFL-CIO ("Local 338") and Lawrence J. Overton served periodically on the union's Welfare Board and Executive Board. Solomon was an officer of a Harlem association of 70 grocery store owners whose employees were members of Local 338. Rosenblum owned two of these grocery stores. Petitioner was a New York State Assemblyman; he was neither an employer, employer representative, nor union official (R. 97, 100, 116, 123, 993).*

CCS had contracts with six food manufacturers to promote their products among retail grocers in the Harlem area. Pursuant to these contracts, CCS solicited store owners, requesting that they stock the products of these six manufacturers. CCS's funds, derived from the manufacturers for this promotional work, was distributed to each of the CCS stockholders by checks drawn on the CCS bank account

* References noted "R" are to the typewritten minutes of trial.

which were signed jointly by petitioner together with either Solomon or Rosenblum (R. 116, 123, 249, 280, 381, 517-20, 848-9).

Count one of the indictment, filed December 8, 1970, charged petitioner, Solomon, Rosenblum and the Overton brothers with conspiracy (Title 18 United States Code Section 371) to violate Title 29 United States Code Section 186 by soliciting agreements from retail grocery employers of Local 338 employees to purchase the products of the manufacturers represented by CCS.

Counts four through twelve of the indictment charged petitioner as an aider and abettor (Title 18 United States Code Section 2) of Solomon and Rosenblum in substantive violations of Title 29 United States Code Section 186, committed by the payment of the CCS checks signed jointly by petitioner and at various times, Solomon or Rosenblum, both Local 338 employers, and distributed to the Overtons, representatives of Local 338 employees.

In regard to these counts, the only charges against petitioner in the indictment that were submitted to the jury, he requested the following instruction on the element of willfulness:

> "The term 'willfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section."

The trial court denied this request (R. 1136), charging instead, on this issue, the following:

> "A general intent to commit the act charged need only be proved. The government must prove only that

the defendant whose guilt or innocence you are considering knowingly did the act which the law forbids, but it need not be shown that the defendant whose guilt or innocence you are then considering knew of or purposely intended to violate the law.

A defendant's intent to conspire as charged may be determined from all the facts and circumstances surrounding the case. However, ignorance of the law forbidding an alleged unlawful act, even if it be a fact, is no defense either to the charge of conspiracy here made, which is Count 1, or to the charge as contained in Counts 4 through 21.

An act or failure to act is only done within the meaning of the statute here if it is done voluntarily and intentionally and not because of mistake or accident'' (R. 1340-1).

Convicted on Count one and Counts four through twelve, petitioner was sentenced to three months in prison with the balance of a one-year term suspended, and fined $5,000.

Reasons for Granting the Writ

The decision below conflicts with the decisions of other Courts of Appeals as to the proper construction of 29 U.S.C. Section 186.

In upholding the trial court's rejection of petitioner's requested instruction on willfulness, the Second Circuit stated that Jack's request was based "squarely" on the language of the Seventh Circuit decision in *United States* v. *Inciso,* 292 F.2d 374, 380 (7th Cir. 1961), Appendix, p. A18. The opinion below on the construction of this essential element of 29 U.S.C. §186 is clearly in conflict with that of the Seventh Circuit in *Inciso.*

Although as noted in the opinion below, *Inciso* "may have been subsequently modified" by the Seventh Circuit decisions, that court has not reversed its ruling on the issue of willfulness (Appendix, p. A18). More significantly, decisions of both the Tenth and Fifth Circuits on the essential element of willfulness in 29 U.S.C. §186 directly conflict with that of the Second Circuit.

In *Korholz* v. *United States,* 269 F.2d 897 (10th Cir. 1959), the Tenth Circuit held "accurate" the following instruction on willfulness in a 29 U.S.C. §186 prosecution:

> "A defendant who actually does violate the provisions of law here involved would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to deter-

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> mine whether the plan he is following would constitute a violation of law or not'' [*id.* at 903].

This construction of the statute is substantially the same as that of the Seventh Circuit in *Inciso*.

And, the Fifth Circuit in *United States* v. *Fischetti*, 450 F.2d 34, 39 (5th Cir. 1971), approvingly cited *Inciso* in ruling on the issue of willfulness in a 29 U.S.C. §186 prosecution. On this issue, the Fifth Circuit in *Fischetti* also based its ruling on *United States* v. *Motzell* (D. N.J. 1961), a district court opinion which adopted the Tenth Circuit's construction of willfulness in *Korholz, supra*.

Further, the opinion below on 29 U.S.C. §186, a *malum prohibitum* statute, conflicts in general principle with the holding of this Court on the definition of willfulness in another *malum prohibitum* statute. Ruling on the meaning of the term ''willfully'' in a statute concerning acts of railroad carriers, this Court stated:

> ''[I]t means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements'' [*United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239, 242-3 (1938)].

Particularly unjust is the application of the Second Circuit's stringent definition of willfulness to petitioner. Neither an employer nor representative of employees, the categories of persons specifically covered by the provisions of 29 U.S.C. §186, he was outside the immediate focus of the statute.

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In sum, the conflict in the Courts of Appeals on the proper construction of this key provision of the Taft-Hartley Law, heavily relied on in federal prosecutions, justifies this Court's granting the petition for certiorari.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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